SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-1519

CROSBY & COMPANY, INC.,

Petitioner,

against

COMPAGNIE NATIONALE AIR FRANCE,
also known as AIR FRANCE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Opinions Below

The Petition seeks the issuance of a Writ of Certiorari to review the order and judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department [pp. 16a-17a of the appendix to the Petition], 42 App. Div. 2d 1050, that unanimously affirmed the judgment of the Supreme Court of the State of New York, New York County [21a-24a], granting defendant's motion for summary judgment dismissing plaintiff's complaint and granting defendant's counter-claim. It is im-

portant to note here that the memorandum decision of the Supreme Court, New York County [25a-50a] contains a number of alternative independent and adequate grounds for granting the summary judgment dismissing plaintiff's complaint. The first such holding was that Respondent's "only legal obligation under the alleged agreement was to act as a transfer agent of funds for Marino Bondi", Petitioner's consignee [30a]. An independent and dispositive second holding is that Respondent did not assent to any provisions in the agreement alleged by Petitioner which would render Respondent liable for the damages sought herein and that Respondent did not contemplate that the agreement alleged by Petitioner would render Respondent liable for the damages sought herein [31a-33a]. As an additional independent alternative ground for dismissing plaintiff's complaint, the Supreme Court, New York County, held that, even if Respondent was found to have breached its obligations under the alleged agreement, and even if Respondent assented to or contemplated liability for the claims herein, Respondent's liability and the time for Petitioner to have given Respondent written notice of its claims were limited by the Warsaw Convention [34a-37a]. It was further alternatively held that, even if the Warsaw Convention was not applicable, Respondent's liability and the time for Petitioner to have given Respondent written notice of its claims were similarly limited by Respondent's conditions of carriage, which were made applicable by each of the following: (1) Respondent's tariff; (2) the air waybill; and (3) the express reference thereto in the alleged agreement. Of course, it was also held that Petitioner did not submit a written claim to Respondent within the requisite time.

Jurisdiction

The Petition states that the jurisdiction of this Court is founded upon 28 U.S.C. § 1257(3) in that a right, privilege,

or immunity is specially set up or claimed under treaties or statutes of the United States. The Petition fails to point out what is indicated in the preceding discussion, i.e., that the judgment below is based upon both federal and non-federal grounds and that the non-federal grounds are enough to dispose of this action. As will be set forth below in more detail, this Court does not exercise jurisdiction over cases in which the judgment below was based upon independent and non-federal questions. Consequently, it is respectfully submitted that, in accordance with its usual practice in such cases, this Court should decline to review this case for lack of jurisdiction.

Questions Presented

As indicated above, the Petition fails to deal with the alternative independent and adequate holdings in the decision of the Supreme Court, New York County. For example, none of the questions presented by Petitioner on this appeal relate to the first two non-federal holdings, each of which was a sufficient ground upon which to grant the summary judgment. In addition, the alternative holdings below are not properly or separately presented as alternatives in the Petition. The following questions were actually raised and determined below, and, if this Court issues a writ of certiorari to review the judgment below, these will be the questions presented:

1. Was Respondent's only legal obligation under the alleged agreement to act as a transfer agent of funds from the consignee to Petitioner and did Respondent fulfill that obligation?

   Answer of the court below: Yes [30a-31a].

2. Did Respondent assent to any provisions in the agreement alleged by Petitioner that would render Respondent liable for the damages sought herein or did Re-

spondent contemplate that the agreement alleged by Petitioner would render Respondent liable for the damages sought herein?

Answer of the court below: No [31a-33a].

3. Is the monetary limitation of liability of Article 22 of the Warsaw Convention applicable to Petitioner's claims herein?

Answer of the court below: Yes [34a-37a].

4. Does Article 26 of the Warsaw Convention limit the time for Petitioner to have given written notice to Respondent of its claims herein and did Petitioner fail to give such notice within that time?

Answer of the court below: Yes [35a-37a].

5. Do Respondent's conditions of carriage limit Respondent's liability for Petitioner's claims herein as a result of each of the following: (1) Respondent's tariff, (2) the air waybill, and (3) the express reference thereto in the alleged agreement?

Answer of the court below: Yes [44a-47a].

6. Do Respondent's conditions of carriage limit the time for Petitioner to have given Respondent notice of its claims herein as a result of each of the following: (1) Respondent's tariff, (2) the air waybill, and (3) the express references thereto in the alleged agreement; and did Petitioner fail to give such notice within that time?

Answer of the court below: Yes [44a-47a].

7. Is Petitioner obligated by law to pay Respondent the price of the ticket of Petitioner's employee who accompanied the trial shipment?

Answer of the court below: Yes [47a-49a].

In addition, if this Court issues a writ of certiorari to review the judgment below, Respondent will raise, as it did below, the question of whether there was any consideration—mutuality of obligation—to support the agreement alleged by Petitioner. The court below did not actually pass on this question but, as indicated above, simply held that Respondent's obligation to Petitioner was not as Petitioner alleged.

Treaties and Statutes Involved

The pertinent provisions are set forth in the Petition at pages 7-8 and 1a-14a.

Statement of the Case

Insofar as the factual background of this matter is concerned, this Court is respectfully referred to the description of the facts contained in the memorandum decision below [25a-29a]. This description is much fairer and to the point than the "Statement of the Case" in the Petition at pages 8-21.

ARGUMENT: REASONS FOR DENYING THE WRIT

I. This Court should decline jurisdiction because the judgment below is based upon independent and adequate non-federal grounds.

As indicated above, the judgment below is based on the memorandum decision of the Supreme Court, New York County that initially sets forth two independent and adequate non-federal grounds for dismissing plaintiff's complaint herein. Notwithstanding the Petitioner's strained contrary view, both of these initial holdings were completely non-federal in that they were based solely on the

courts' interpretation of the letters alleged by Petitioner to constitute the agreement upon which Petitioner's action is based [30a-33a].

Particularly apposite here is the following language from *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935):

> [W]here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. This rule had become firmly fixed at least as early as *Klinger* v. *Missouri*, 13 Wall. 257, 263, and has been reiterated in a long line of cases since that time.

In *Fox*, a holding below regarding the construction of a contract was found by this Court to involve a dispositive non-federal question. As a result, this Court dismissed the writ for want of jurisdiction, even though there was a second holding below that the contract in question was invalid under federal law. *Cf. Wilson* v. *Loew's, Inc.*, 355 U.S. 597 (1958).

Consequently, it is respectfully submitted that this Court lacks jurisdiction over this case and should decline to issue a writ of certiorari to review the judgment below.

II. There are no special or important reasons for reviewing the judgment below.

The memorandum decision of the Supreme Court, New York County, upon which the judgments below are based raises no important issues worthy of this Court's review. That decision's comprehensive discussion of the federal law is accompanied by extensive citations to particular federal decisions and provides a clear demonstration that well-established federal precedent was properly applied to the federal questions herein on the basis of uncontested

documentary evidence. It should also be mentioned that there is no decisional conflict requiring resolution by this Court and that the decision below does not call into question the validity of any provision of the federal Constitution, treaties, or federal statutes.

Though the controversy itself may be "significant", no novel theory of federal law was applied nor was any federal law applied in a novel fashion. The only novel aspect of this case is the factual situation, which mitigates against further review; for a decision by this Court in the factual context of this case would be unlikely to assist in resolving other litigation.

Therefore, it is respectfully submitted that there are no special or important reasons for reviewing the judgment below and that this Court should decline to issue a writ of certiorari to review that judgment.

III. The judgment below is correct.

Rehashing here the merits of Respondent's claims in the lower courts would be inappropriate. In the course of this litigation, Respondent has submitted numerous and voluminous affidavits and briefs, and they cannot be briefly summarized. On the other hand, it is our understanding that this Court does not desire to have a lengthy discussion of merits in a brief in opposition to a petition for a writ of certiorari. However, for present purposes, Respondent is confident that the memorandum decision of the Supreme Court, New York County, adequately speaks for itself. The Petitioner has raised no issues of law or fact that in any way reflect upon the soundness of that decision or upon the unanimous affirmance by the Appellate Division. Basically, the Petition is marked by a manifest misunderstanding of the holdings below (which misunderstanding has resulted in gross overstatement as to the consequences of those holdings). The Petition also includes a number

of calculated irrelevancies. Most importantly, the Petition is patently founded upon various conclusory statements as to the applicable law that are unsupported by any decisional authority whatsoever. This is to be contrasted to the numerous citations to appropriate precedents that are found in the memorandum decision below.

Consequently, it is respectfully submitted that the judgment below correctly determined the merits of this case and that this Court should decline to issue a writ of certiorari to review that judgment.

CONCLUSION

This Court lacks jurisdiction over this case. Furthermore the record of this case contains nothing that warrants review by this Court. Therefore, the petition for a writ of certiorari should be, in all respects, denied.

Respectfully submitted,

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